

SOME

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OBSERVATIONS

ON

TWO PAMPHLETS

Lately Published;

THE ONE ENTITLED,

An ENQUIRY into the Force and Operation of the annulling Clauses in a late ACT for the better preventing of Clandestine Marriages, &c.

*Great Brit
George II
app*

THE OTHER,

A DISSERTATION on the Power of STATES to deny Civil Protection to the Marriage of MINORS, &c.

In a LETTER to a FRIEND.

LONDON,

Printed for A. MILLAR, in the Strand.

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OBSEKRVATIONS

TWO PAMPHLETS

By J. R. R. R.

THE ONE PAMPHLET

At the end of the first and second
volumes of the series of books in this
series, the author has placed a list of
the names of the persons who have
been consulted in the preparation of the
series.



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MCCCLX

SOME
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ON
TWO PAMPHLETS.

In a LETTER to a FRIEND.

SIR,

I HAVE perused the two Pamphlets which I brought with me very lately into the Country, and intend now to acquit myself of my Promise, in communicating to you my Thoughts upon them without Reserve. Many, yet trifling, are the vulgar Prejudices that

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have

have been raised by Writers of no Character against the Marriage Act, which was passed the last Parliament; but the Pamphlets before me apply to the Conscience, and being wrote by an eminent Hand, have a manifest Tendency to raise Scruples in considerate Minds concerning the Reasonableness and Equity of the Law itself. Every Attempt therefore to vindicate it, as it is now a Law in full Force, is laudable.

THE Author insists very largely, That the Right of contracting Marriage is an *unalienable* Right.

“ As in a State of Nature the de-
“ cative

"citive Right of contracting Mar-
 "riage lies in the Child, so it
 "must under Society," (p. 11.
Enquiry.) Again; "No Man, by
 "entering into Society, can, or
 "ought to be presumed to have
 "yielded up into the Hands of
 "the Society his natural Right to
 "contract Marriage, as shall seem
 "to him most convenient for the
 "Security of his Virtue." (p. 13.)
 Let it be granted that the Child
 cannot make a Cession of this Right
 into the Hands of the Society; yet
 what hinders, but it may be sus-
 pended for a Time? I know no
 Right that may not be suspended
 under Society. The Law supposes

the decisive Right of contracting Marriage to lie in the Child, or it need not provide against the clandestine Marriages of Minors ; it only restrains the Use and Exercise of this Right, for the Benefit of the Child.

The Right then being admitted with this Restriction, let us suppose with him (p. 15.) a Marriage Contract made in Pursuance of this Right, and the Question to be, Whether this Marriage may be dissolved by human Laws. I answer, Yes; for the same Reason, that a Contract made by a Minor to pay a Sum of Money after he comes of Age,

Age, is void in Law. If a Minor executes a Bond, he is no Knave, though he does not pay the Money; his Conscience in this Case will not bind him; because in general he really is, as the Law always supposes him to be, an incompetent Judge of the Conditions. The Law neither does, nor can divest the Minor of the Right to his Estate, but it may and does settle the Time when a Minor shall come to the Enjoyment of his Estate; so in the Case of Marriage, the Law neither does nor can settle the Commencement of the Right of contracting, but it may and does settle the Time when a Minor shall come to the free Use

Use of this Right. Otherwise a Minor might as effectually endow another with all his worldly Goods by Marriage, as by Bond or any other Contract whatsoever.

BUT our Author goes on (p. 20.)
 “ The Right to contract either now
 “ or a Year or two Years hence, he
 “ cannot give up to Society, nor
 “ can he lay himself under any Con-
 “ ditions that are subversive of that
 “ Right, because he has it not in
 “ himself to dispose of, as he will
 “ stand bound by the Law of God,
 “ if he has not the Gift of Conti-
 “ nency, to have Recourse to Mar-
 “ riage as the proper Remedy.”

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This Argument, I apprehend, will carry him farther than he intends; for let us suppose the Parties to a Marriage to be Thirty or Forty Years of Age; in the Case of Unfaithfulness to the Marriage Bed, and in some other Cases that may be put, wherein the Contract voids itself, and their original natural Right of contracting remains entire, what Recourse have they to the proper Remedy against Fornication? They have precluded themselves as effectually, and *laid themselves under Conditions that are subversive of the Right of contracting*, as the Minor is precluded by Law, and can only be relieved by the Intervention of the

the Civil Authority, which under proper Circumstances will relieve the Minor.

Not every Renunciation of the Means appointed by God for the Preservation of Chastity, or every Vow of Celibacy, as our Author puts it, (p. 13.) but *a full and absolute* Renunciation or a Vow of *perpetual* Celibacy, every Protestant must allow to be unlawful and null *ab initio*. *Puffendorf* therefore very well observes, “ That it would be
 “ both unjust and foolish to make
 “ a Law forbidding all Subjects to
 “ marry, as likewise to make a Law
 “ by which only the First-born
 “ should

“ should be permitted to marry,
 “ and the rest tied down to a
 “ State of Celibacy ; because it
 “ cannot be that so many should
 “ be qualified to live chastly in a
 “ State of Celibacy.” (p. 43. *Dif-*
fertation.) This indeed is a very
 good Reason to prove that the
 Civil Authority cannot forbid all
 the Subjects to marry, or any con-
 siderable Part of them, and it is
 a very good Reason to prove that
 it cannot forbid any one Person to
 marry ; but, with the Author’s
 Leave, I would ask him, how it
 is applicable to the Case of Minors
 before us. Fools and Madmen,
 whilst such, cannot marry ; and
 C why

why may not the Use of the Marriage Bed be denied to Minors for a Year, or two or three Years, in order to prevent great Inconveniences that might ensue from an earlier Use of their natural Right? For it is very observable, that Marriage, when entered into wantonly and unadvisedly, is the most plentiful Source of domestic Evils; it oftentimes frustrates the Intention of its own Divine Institution, and becomes itself in the End a true Renunciation of the Means appointed by God for the Preservation of Chastity.

PUFFENDORF lays it down,
 “ That since the Obligation to
 “ Matrimony is undeterminate, and
 “ admits of some Latitude, the
 “ Civil Authority may fix the
 “ Age when Persons shall be fit
 “ to be joined in Marriage.” (p. 4.)

No reasonable Man will put this
 Sense upon the Words, that Law-
 givers are at Liberty arbitrarily to
 fix what Time they please. But
 when the Legislature has deter-
 mined at what Age Persons are
 ordinarily of *sufficient Discretion*,
 not merely of *moral Capacity*, to
 make the Marriage Contract, this
 may be presumed to be the Age

proper to be fixed by the Civil Authority, when they may be fit to be joined in Marriage; and the Law that fixes the same Age for the Validity of Marriage Contracts that it requires for the Validity of other Contracts, is surely a very safe and reasonable Law.

THE Questions concerning the Consent of Parents, which some insist upon as necessary by the *natural Law*, to the Validity of a Marriage Contract, or what Right Parents have, as *Masters of Families*, to prohibit or rescind the Marriages of their Children, are, I think, though largely discussed
by

by our Author, remote from his Purpose. The *Enquiry* is concerning the *Power of States* to deny their Protection to the Marriages of Minors; no Matter, whether such Power be founded in Nature, it is sufficient, if it be not contradictory to the Law of Nature. Concerning the *Power of States* to oblige Children to wait their Parents Consent in Marriage, *Puffendorf* is very express: For having mentioned several Restraints which Civil Laws may lay upon Marriage, he adds, *Quarum legum ea vis esse potest, ut quod contra easdem contrahitur connubium, certis effectibus, per jus civile assignatis destituatur,*

tuatur, vel etiam omnino pro inva-
lido, et quod rescissionem admittat,
declaratur. (Lib. vi. cap. 1, 8. *De*
Jur. Nat.) Wherefore our Author
 should restrain the Adverb “*om-*
 “*nino,*” which he construes “*ab-*
 “*solutely,*” to *Civil Estimation* on-
 ly, or wherefore he should con-
 strue the Word “*Civiliter*” in an-
 other Passage “*in Civil Estima-*
 “*tion,*” (p. 26.) and not “*by the*
 “*Civil Authority,*” I cannot com-
 prehend: How unwarily then does
 he observe upon these Passages,
 that the Limitation of the Nul-
 lity, which Laws may declare a-
 gainst Marriages in certain Cases,
 to *Civil Effects only*, carries with
 it

it a Confession, that no Act of Law can destroy the *Vinculum Matrimonii*, as it lies in Conscience, and on no better Grounds assumes this *petitio principii*, that the Consideration of a Parent's being under Society gives him in this Respect no more Right over his Child, than he had or would have out of Society. (p. 28.) I will therefore point out a Reason in *Puffendorf's* own Words, because our Author desires it, why *Puffendorf* lays it down so positively, that the Law may annul the Marriage of a Child as to all Civil Effects, merely because the Parent's Consent is wanting; and
it

it is this, *Facultas moralis — ad præstandum quid nos obligandi, deest circa res et actiones alienas, quippe quæ non nostro, sed alterius arbitrio sunt subjectæ.* The Child by an Act of Society is put under the Parent's Will; consequently the Marriage of such a Child without his Consent is void in Conscience as well as in Law: Which is our Author's Argument turned against himself. *Puffendorf's* Observation therefore is just; but it will not serve our Author's Purpose for which he makes the Quotation, (p. 29.) “ That carnal Knowledge, and the Consent (or Marriage) of the Persons

“ sons cohabiting together, where
 “ the Civil Laws contradict, can
 “ no more render such Marriage
 “ valid, than a Sale and Delivery
 “ made by a Minor, without the
 “ Consent of his Guardian, can
 “ pass away the Title of his E-
 “ state.” Here is no Limitation
 of the Nullity. It will not be
 maintained, I think, that the Sale
 and Delivery made by a Minor is
 valid either in Law or Conscience:
 No more is his Marriage.

FOR I am not of our Author's
 Opinion, (p. 21. *Enquiry*) That
 a Marriage Contract is so entire-
 ly of a *religious* Nature, that it

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cannot

cannot be discharged by the Civil Authority. Nor is it a mere Civil Contract. It is of a mixt Nature; neither merely Religious, nor merely Civil. The Institution is Religious, but the Contract, so far as Society is concerned in it, is Civil, and may therefore be dissolved by the Civil Authority. How far God is concerned in it, the Circumstances of every particular Marriage must determine. What? shall we subscribe to our Author's Casuistry, that there is no such thing as a Contract, in which God is not concerned? And
 " though all the Laws in the
 " World should reclaim, you can-
 " not

“ not break it without offending
 “ Him.” Concerned He is as a
 Judge to punish the Maker, but
 shall we say God is a Party to a
 fraudulent or iniquitous Contract?
 A Marriage Contract considered
 merely in a religious View, as a
 solemn Vow or Oath before God
 between the Man and the Wo-
 man, in which Society has no
 Concern, cannot indeed be dis-
 solved; I remember Bishop *San-*
derson somewhere gives this Rea-
 son, *Quia ibi non utilitas tantum*
hominis spectatur, sed et institutum
Dei; but if Society be taken into
 the Account, there arises a new
 Obligation, and the Contract is

null, *ipso facto*, if it does not coincide with the Interests of the Society, that is, if it be not conformable to the Laws and Regulations of the State, which are enacted for its Safety and Convenience. For as an Obligation cannot be relaxed by one Party to the Disadvantage of other Parties concerned, no more can it have any Force or Operation without the Concurrence of the Interests of them all.

To return then to Baron *Pufendorf's* Opinion. He has furnished us with a Reason why the Law may restrain a Minor from
 4 passing

passing away his Estate, and the
 same Reason will hold to prove,
 That the State may deny its Pro-
 tection to his Marriage. It is
 this ; That the Child is by the
 Civil Authority put under the Will
 of his Parents or Guardians ; and
 if it be for the Benefit of the Child,
 I might add, for the Benefit of
 the Community, which the State
 is to judge of, the State has, with-
 out Doubt, a Right to do it.
 Thus the grand *Desideratum* of
 our Author (p. 30.) is happily
 supplied. And, not to enter with
 him into a minute Disquisition
 upon the Nature and Extent of the
 Parental Authority, it may with-
 out

out any Absurdity be presumed, that if a new-born Infant was furnished with the Aid of Reason, and could see that he would probably plunge himself into many Inconveniencies by the Use of his natural Right to contract Marriage, he would willingly consent to submit himself to the Authority of his Parents or Guardians, and preclude himself from the Civil Protection of the State if he contracted Marriage without their Consent.

Such a Consent may be well understood as implied under that general Consent, which every
Mem-

Member of Society, as such, must be supposed to have given, to recede from his *private Right*, when it comes in Competition, I will not put it as our Author does, (p. 35.) with *the Public Good*, but with his own *private Good*. How difficult soever it may appear to him to shew what Connection the annulling a Minor's Marriage has with either, it has nevertheless merited the Attention of the Legislature.

BUT an Appeal is made (p. 45.) to the *Friends of Liberty*, whether the annulling Clauses as to Minors will stand with the Principles of Liberty.

Liberty. The natural Liberty of Man to be free from any superior Power upon Earth, and to have only the Law of Nature for his Rule, and the Liberty of Man in Society to be under no other Power but that established by Consent, nor under the Restraint of any Law but what the Legislative shall enact according to the Trust reposed in it: Again; the Liberty of a Man at Years of Discretion, and the Subjection of a Child in his Nonage, are so consistent and so distinguishable, that I do not see how Liberty, Natural or Civil, is at all concerned in the Question. At what Time a Man is *of Age*

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to be free, the judicious *Hooker* observes, it is a great deal more easy for Sense to discern, than for any one by Skill and Learning to determine; (*Eccl. Pol.* i. 6.) But there must be a fixed Time in Society, when Men are *to begin to act like free Men*; and till that Time, no Acts of Manhood are required or allowed of; no Oaths of Fidelity or Allegiance to the Government are exacted, no voluntary Contracts are esteemed valid. I profess myself a warm and zealous Friend of Liberty; and would by no Means be an Advocate for the Reasonableness and Equity of the Marriage Act, if I thought there was

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the least Appearance in any Part of it of an Infringement upon the *Liberty* of the good People of *England*, whose Love of their *natural and civil Rights*, with their Resolution to maintain them, saved the Nation when it was upon the Brink of Slavery.

FINIS.

